IN THE

Supreme Court of the United States

October Term, 1965

No. 392

EARL L. STAGER,

Petitioner,

vs.

FLORIDA EAST COAST RAILWAY COMPANY,
a Florida corporation,

Respondent.

BRIEF IN OPPOSITION

THE FLORIDA EAST COAST RAILWAY COMPANY, by its attorneys, Bolles, Goodwin & Ryskamp, Esquires, hereby submits its brief in opposition to the petition for Writ of Certiorari, herein filed, seeking a review of the order of the District Court of Appeal of Florida, Third District dated April 7, 1964, or the order of the Supreme Court of Florida dated April 28, 1965, discharging a Writ of Certiorari as improvidently issued.

OPINIONS BELOW

The petitioner has made proper reference to the opinions of the Florida courts in the petition herein filed. The respondent takes exception to the reference by the

petitioner that the $15,000 jury award was "miniscule" and the uncomplimentary references by the petitioner of the trial rulings. In this regard, it must be noted that the petitioner previously has never contended that the jury verdict was inadequate. As noted in the opinion of the district court:

> "It was candidly conceded by counsel for plaintiff during oral argument in this case [if not in his brief] that the jury's verdict on the evidence presented to it was not inadequate."

Petitioner is raising the inadequacy of the verdict for the first time in the petition presented to this Court.

JURISDICTION

Respondent shares the opinion of the petitioner that the decision under review is that of the District Court of Appeal, Third District. The statutory basis, relied upon by the petitioner, finds support neither from the record nor from the decision below. 28 U.S.C. § 1257(3) provides certiorari review of state courts upon three grounds. Allegedly petitioner is relying upon the first and third ground.

The first ground creates jurisdiction ". . . where the validity of a . . . statute of the United States is drawn into question . . ." The petitioner has made no claim that the "validity" of the Federal Employer's Liability Act [45 U.S.C. § 51, et seq.] was questioned but has conceded that this cause involves only the "construction" of a federal statute.

The second ground creates jurisdiction when" . . . a right or privilege is claimed under the Constitution of the United States." The petitioner failed to raise any question of an infringement of Constitutional rights in the state courts thus precluding the jurisdictional basis for raising the question on this Court.

QUESTIONS PRESENTED

1. In this suit under the Federal Employer's Liability Act, where the respondent never raised the defense of assumption of risk, where no mention was made by the respondent of assumption of risk, where the evidence supported a jury finding that the petitioner failed to exercise reasonable care for his own safety, the trial court did not err in refusing to charge the jury that assumption of risk is no defense and in charging the jury that contributory negligence was no bar to petitioner's claim but served to reduce his damages.

2. The petitioner was not denied the right of jury trial or due process of law by rulings of the trial judge which limited the number of expert witnesses and restricted cross-examination to the scope of direct examination.

STATUTE INVOLVED

Respondent contends the only federal statute involved in this cause is 45 U.S.C. § 54, which was properly applied by the trial court in denying the petitioner's requested jury charge on assumption of risk. The Florida

courts never placed the validity of this statute in question. This statute is set forth in full in the petition for Writ of Certiorari.

Respondent denies the necessity for any reference to 45 U.S.C. § 51, Amendment VII and Amendment XIV of the United States Constitution.

STATEMENT OF THE CASE

This is a case wherein the jury found liability under the Federal Employer's Liability Act. No useful purpose would be served by analyzing facts other than those which are directly related to the questions raised by the petition.

At the outset, it is important to note that the petitioner has failed to comply with Supreme Court Rule 23(f), which provides, inter alia:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's

charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so at to give this court jurisdiction to review the judgment on writ of certiorari."

In this regard the respondent submits that the petitioner never raised any question in the state courts relating to a violation of Amendment VII and XIV of the United States Constitution. The record further fails to reflect any objection by the petitioner to the "two-doctor rule" until after the verdict proved to be unsatisfactory.

The petitioner must contest certain contentions of the petitioner which are set forth in the Statement of he Case. The respondent never admitted that the special damages were $20,000. Petitioner's reference to pages 1078, 1079 of the record do not bear out this so-called admission, but, to the contrary, clearly demonstrate the conflict on the damage question. The medical bills of $2,750 were disputed by the respondent on the ground that some of the medical expense pertained to an injury not related to the petitioner's employment (R 1078-1079, 830-832). As a matter of fact, the respondent contended, and the jury may have so found, that petitioner's operations were not the result of the incident upon which this suit is based (R 669-671). The respondent disputed the claimed wage loss of $17,200 as there was ample evidence in the record, which a jury could believe, that the petitioner was able to go back to work but refused to do so (R 1078, 829, 813, 659-661).

The foregoing discussion is necessary to demonstrate the erroneous conclusions of the petitioner (Petition, p.

6) that the jury either found that Stager was not permanently disabled or that Stager was guilty of contributory negligence. Stager's own doctor rated his disability between 6% and 15% (R 825). Not one doctor said that the petitioner was incapable of doing any work again. Petitioner's attempted verdict analysis is interesting but, when the record is reviewed in the light most favorable to the respondent, it is apparent that the jury could have found no contributory negligence and awarded Stager for his pain and suffering and some medical expense, but rejecting the total wage loss claimed and some of the medical.

The foregoing clearly demonstrates the impropriety of this case in this Court. This is simply a case where a claimant under the F.E.L.A. failed to get an award as large as he expected. In order to activate this Court's jurisdiction, the petitioner has concocted his own private theory of what the jury verdict represents. If petitioner is allowed to make his own record, the jurisdictional aspects of this case are limitless. When the record is reviewed in true prespective, there is no basis for this Court's jurisdiction.

ARGUMENT

Point One

Trial Court Properly Charged on Contributory Negligence and Properly Refused to Charge that Assumption of Risk was no Defense.

As previously noted, this is simply a case wherein the petitioner did not receive as large a verdict as he ex-

pected. The $15,000 verdict was certainly a substantial one for an injury which left the petitioner with a permanent disability of between 6% and 15%. Furthermore, the petitioner never claimed the verdict was inadequate prior to the filing of the petition in this Court.

A. Contributory Negligence

Petitioner's whole argument seems to be based upon the fact that there was no rule which prevented the petitioner from boarding the train while the yard crew was still engaged in switching operations. Although there was no rule preventing such conduct by the petitioner, the petitioner's supervisor testified that engineers learn, as a matter of experience, not to board a train until it is completed by the yard crew (R 787, 789):

> "Q Let us go back a minute on the question about rules that are not written, the rules of procedure that are learned by experience.
>
> Tell the jury, if you will, please, what the rule is as pertains to the arrival of an engineer on call and then when he is to take over the control of the engine.
>
> * * * *
>
> A The procedures are that the crews will not take charge of the train or the engines until the trains are completed.
>
> Q When you say 'the crews', which crews are you talking about?
> A The road crews, outbound crew.

Q Is Mr. Stager on the road crew?
A Yes, sir.

Q You say not until the train is completed. What do you mean by completed?
A Until the train is made solid and engines placed on the train."

The test in determining whether the petitioner was guilty of contributory negligence is whether he used reasonable care under the circumstances presented. The jury may have found that an experienced engineer would not have boarded an engine until the train was completed and "made solid." The petitioner had no control over the switching operations and therefore any movements would be unexpected. Under these circumstances he should have braced himself for unexpected jerks and jolts. Although the petitioner testified that he did brace, the jury may have disbelieved this testimony since the fireman, who was also on the engine, was not injured by the switching operation.

The courts have long recognized that a failure to brace, under circumstances wherein sudden stops or jerks may be expected, may constitute contributory negligence on the part of an employee. **Davis v. Florida East Coast Railway Company**, Fla. App. 1962, 138 So.2d 97; **Lehigh Valley R. Co. v. Normile**, 2 Cir. 1918, 254 F. 680; **La Mere v. Railway Transfer Co.**, 125 Minn. 159, 145 N.W. 1068; **Salisbury v. New York Central R. Co.**, 220 App. Div. 491, 222 N.Y.S. 38.

It must be further noted that there is nothing in the record to support a conclusion that the jury found

any contributory negligence on the part of petitioner. Since the jury did not return a special verdict, and since petitioner has conceded that this verdict is not inadequate, it appears that petitioner received full compensation from the jury for his injuries.

B. Assumption of Risk

Despite the protestations of the petitioner to the contrary, the sum and substance of all reported decisions which have considered the question of a negative charge on assumption of risk is that the giving of such a charge is within the discretion of the court. Ordinarily, courts do not charge the jury on legal issues which do not apply to the case under consideration. Of course an exception would exist were the issue injected into the case by the pleadings or otherwise, but such is not the case herein.

The petitioner acts under the assumption that the average juror is thoroughly conversant with the legal doctrine of assumption of risk and, in F.E.L.A. cases, there is a need to expunge this legal information from their consideration. Nothwithstanding the fallacy of such a premise, the petitioner completely ignores the warning of Justice Frankfurter in **Tiller v. Atlantic Coast Line R. Co.**, 318 U.S. 54, 87 L.Ed. 610, 63 S. Ct. 44, as follows:

> "Because of its ambiguity the phrase 'assumption of risk' is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It should therefore be disregarded."

Petitioner places great reliance on the decision of the Third Circuit in **Koshorek v. Pennsylvania Railroad**

Company, 318 F.2d 864 (3rd Cir. 1963). Respondent will not refute the argument of the majority, which seems to be the minority rule, but will refer the Court to the cogent dissent of Judge Ganey (318 F.2d 371) which clearly gives warning of the erroneous course set by the majority.

The basic issue in this case is whether the respondent furnished the petitioner with a safe place to work. The Court properly charged the jury on the duty of the employer under the F.E.L.A. Obviously, the jury found that a safe place to work was not furnished and awarded the petitioner $15,000 in damages. Despite the petitioner's contentions to the contrary, the jury resolved a simple issue under an appropriate charge from the trial court. There is no basis for further review by this Court.

Point Two

The Trial Court Did Not Abuse Its Discretion in Ruling Upon Evidentiary Questions

Rule 1.16(4), Florida Rules of Civil Procedure, authorizes the trial court to limit the number of expert witnesses. The trial judge held that each side would be limited to two medical witnesses. Nowhere in the record is there any indication that the petitioner objected to such a procedure. On appeal, the petitioner tested the discretion of the trial court in the District Court of Appeal, Third District, which found no abuse of discretion. The district court noted that the limitation of expert witnesses has been recognized under Rule 16, Federal Rules of Civil Procedure; Southern Pacific v. Marquez, 44 F.2d 286 (9th Cir., 1930) and Montrose Contracting Co. v. Westchester County, 94 F.2d 580 (2nd Cir., 1938).

The trial court recognized the petitioner's penchant for "doctor shopping" and refused to permit every doctor to testify. Only after the jury returned a verdict that did not please the petitioner did this ruling become significant.

Wtih regard to the limitation on Dr. Perlmutter's testimony, the petitioner fails to mention the factual background for this ruling. This cause was partially tried on an earlier occasion but resulted in a mistrial. This mistrial was provoked by petitioner's counsel who was fined $500 by the trial court (R 98). At the time of the first trial, Dr. Perlmutter had examined the petitioner pursuant to an order of the court. During the interim between the first trial and the second trial, petitioner was reexamined by Dr. Perlmutter. This second examination was not pursuant to court order.

At the second trial, the trial court limited the examination of Dr. Perlmutter to the scope of the direct examination of the respondent. Dr. Perlmutter testified regarding the only examination he made as a court-appointed physician. The jury heard the same testimony that the jury at the first trial heard. Any contrary ruling by the trial court would permit petitioner to take advantage of the mistrial which was provoked by his counsel.

The district court considered the petitioner's contentions and properly found no reversible error:

> "As to the court-appointed physician, this cause was before the trial court on two occasions. The first trial resulted in a mistrial. Prior to the first trial, the judge announced his two-witness

limitation as to medical evidence. Also prior to the first trial a court-appointed physician had been appointed and had examined the plaintiff. During the interval between the first and second trials, the plaintiff visited the court-appointed physician (not pursuant to any court order or agreement of counsel) and was treated by said doctor. Upon the second trial, the trial judge concluded that to permit evidence of the subsequent examination by the court-appointed physician (which examination was in the nature of that of a treating physician) would violate his previous admonition that only two medical witnesses would be permitted. No error in excluding the doctor's testimony on this ground has been made to appear. What he would have testified to was proffered in the evidence and its effect was that the plaintiff was unable to continue in the occupation of a railroad engineer. However, this evidence would merely have been cumulative to that testified to by the two treating physicians."

It is evident from the foregoing that the petitioner received a fair trial which safeguarded all his Constitutional rights.

CONCLUSION

This case presents nothing more than dissatisfaction by the petitioner on the size of the verdict received from the jury. The jury was properly charged on the law and was permitted to consider all pertinent and admissible evidence. There is no basis for this Court's jurisdiction after the full and complete review given by the state courts.

Respectfully submitted,

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